

SERVICE DATE – APRIL 30, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35504

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision denies a petition by Union Pacific Railroad Company (UP)—seeking a declaratory order finding reasonable certain tariff provisions that require shippers of Toxic-by-Inhalation Hazardous commodities to indemnify UP against all liabilities, other than those liabilities resulting from UP’s negligence or fault—because UP has not supported the overly broad effect of its tariff provisions.

Decided: April 25, 2013

Union Pacific Railroad Company (UP) filed a petition on April 27, 2011, requesting that the Board issue a declaratory order to resolve a controversy regarding the reasonableness of the indemnification provisions in UP’s tariff relating to transportation of Toxic-by-Inhalation Hazardous commodities (TIH). As discussed below, UP’s petition for a declaratory order will be denied.

BACKGROUND

Safe and efficient transportation of hazardous materials, including TIH by rail, is crucial to our nation, and federal agencies have established an extensive set of regulations and requirements that are intended to minimize the hazards of transporting these materials by rail.² The railroads have expressed concern, however, that the transportation of TIH subjects them to the potential for extremely high liability in the event of a rail accident that causes a TIH release.

In this proceeding, UP’s petition requests a declaratory order from the Board finding reasonable Items 50 and 60 of UP Tariff 6607, “General Rules for Movement of Toxic or Poison

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language in Decisions, EP 696 (STB served Sept. 2, 2010).

² See, e.g., 49 C.F.R. pts. 171-180 (hazardous materials regulations issued by the Pipeline and Hazardous Materials Safety Administration); 49 C.F.R. pts. 209-244 (railroad safety regulations issued by the Federal Railroad Administration); 49 C.F.R. pt. 1580 (rail transportation security regulations issued by the Transportation Security Administration).

Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad” (the tariff provisions), which are attached as an exhibit to the petition. Item 50 of the tariff provisions requires TIH shippers to indemnify UP and any parent or affiliated companies against “any and all liabilities except those caused by the sole or concurring negligence or fault” of UP. Thus, shippers are required to indemnify UP against liabilities resulting from the negligence or fault of shippers themselves, the negligence or fault of third parties, or acts of God. The tariff provides that this indemnity includes, but is not limited to, any liabilities arising from:

- any failure of, release from, or defect in equipment tendered by customer for the transportation of commodity;
- loading, sealing, and securing commodity in such equipment;
- release, unloading, transfer, delivery, treatment, dumping, storage, or disposal of commodity not caused by the sole or concurring negligence or fault of railroad;
- any fines, penalties, or suits resulting from alleged or actual violation of federal, state or local environmental or other law, statute, ordinance, code, or regulation that was not attributable to railroad; and
- any loss caused by the sole negligence or fault of customer.

Pet. for Declaratory Order, Ex. A.

Item 60 of UP’s tariff states:

When liabilities are caused, in whole or in part, by the joint, contributory, or concurrent negligence or fault of the railroad, customer, or any other party, responsibility for liabilities shall be adjudicated under principles of comparative fault in which the trier of fact shall determine the percentage of responsibility for railroad, customer, and any other party. Railroad shall be liable only for the amount of such liabilities allocated to the railroad in proportion to railroad percentage of responsibility. Customer shall be liable for all other liabilities.

Neither railroad nor customer may reduce its pro rata share of negligence or liabilities under this tariff by agreement or settlement with any other party or claimant.

Id.

By decision served on December 12, 2011, the Board instituted a proceeding in response to UP’s petition and established a procedural schedule. Pursuant to the procedural schedule, parties filed opening evidence and argument on January 25, 2012, replies on March 12, 2012, and rebuttal on March 26, 2012.³

³ On March 14, 2012, the American Chemistry Council and the Chlorine Institute (ACC/CI) filed a motion to strike certain materials included in UP’s opening evidence and argument because UP had, in ACC/CI’s view, revealed confidential settlement discussions and

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DISCUSSION AND CONCLUSIONS

Under the Administrative Procedure Act, 5 U.S.C. § 554(e), and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. We have broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989).

The Board recognizes the importance to our nation of both a safe rail network and safe carriage of TIH commodities. TIH commodities have long moved over the rail network, subject to an extensive regime of federal safety regulations. Over the years, the arrangements by which TIH commodities move by rail have largely been negotiated by the carriers and shippers, or determined by application of state and/or federal law. In recent years, a number of issues related to the carriage of TIH commodities have been raised at the Board, often with complex and potentially broad implications. In general, we have determined that it is prudent to tread carefully in this area, avoiding broad pronouncements and relying instead on narrow adjudications of specific tariffs.⁴

In this case, UP's tariff provisions require TIH shippers to indemnify UP for "all liabilities" not caused by UP's negligence or fault. See Pet. for Decl. Order, Ex. A. Shippers oppose this tariff language, with many asserting, inter alia, that UP's tariff provisions have a wider effect than its arguments might suggest. See, e.g., Olin Corp. (Olin) Rebuttal 4-5; Interested Parties Rebuttal 11-12. We agree that the language and effects of UP's tariff provisions are overly broad for the reasons discussed below.

I. Indemnification for Liabilities Not Due to the Presence of TIH

The arguments UP offers in support of the tariff provisions at issue are based on the serious hazards of transporting TIH commodities in contrast to other commodities (see, e.g., UP Opening 8, 13-15). We are concerned, however, that the tariff language could subject TIH shippers to a wide range of liability that is not related to the presence of TIH. For example, if a train carrying TIH derails, resulting in a spill of diesel fuel but no TIH release and no evacuation or other TIH-related impact, the tariff provisions could nonetheless subject TIH shippers to liability to the extent the damage was caused by a third party or act of God. See Olin Reply 13.

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mischaracterized the position of ACC/CI in a state court case. UP filed a reply on March 26, 2012. We do not rely on the materials ACC/CI asks us to strike, nor do we find the materials probative. Accordingly, the Board need not rule on the motion to strike.

⁴ See Establishment of the Toxic by Inhalation Hazard Common Carrier Transp. Advisory Comm., EP 698 et al., slip op. at 4 n.8 (STB served Apr. 15, 2011); DOT Comments, Mar. 12, 2012 (advocating that the Board carefully consider changes that may result in a shift of TIH commodities from rail to less safe transportation options).

Therefore, the tariff could apply well beyond the circumstances for which UP has sought to justify it.

In its pleadings, UP attempts to clarify its tariff, arguing that it does not intend for the indemnity language to apply so broadly. UP contends that the indemnity language in its tariff should apply only “when the presence of TIH is a ‘but for’ cause of liabilities.” See UP Rebuttal 5. However, the tariff does not contain such “but for” language or otherwise limit itself to the situations that UP describes in its pleadings. Thus, one meaning is apparent on the face of the tariff, but according to UP, the indemnity provisions actually have a different meaning, which can be found in pleadings filed in this declaratory order proceeding. In this instance, leaving such an ambiguity in place would not adequately inform TIH shippers what service terms they are accepting under the tariff.⁵

II. Indemnification for Liabilities for which Protection Is Available Without UP’s Tariff Provisions

UP argues that its tariff provisions are necessary, among other reasons, because carrying TIH can lead to catastrophic incidents, against which an indemnity is the most effective protection available to UP, absent a public policy solution such as the Price-Anderson Act.⁶ See, e.g., Pet. for Declaratory Order 5; UP Opening 2, 9-10 & V.S. of Diane Duren 2-5.⁷ For example, UP states that it was able to purchase only \$1.2 billion of commercial liability insurance in 2012, but estimates that losses from an incident resulting in a large chemical release in an urban area could be in the tens or hundreds of billions of dollars.⁸

In any case, under its tariff provisions, UP’s indemnity requirement is not limited to the catastrophic incidents for which UP claims it cannot obtain insurance or other protection. Shippers would also be *required* to protect UP from smaller liabilities against which UP can already protect itself through insurance. We consider the effect of the tariff provisions to be overly broad in this respect.

⁵ See 49 C.F.R. § 1300.2 (requiring disclosure of service terms upon formal request).

⁶ See 42 U.S.C. § 2210 (legislation designed to ensure that adequate funds would be available to satisfy liability claims of members of the public for personal injury and property damage in the event of a catastrophic nuclear accident).

⁷ See also UP Comments, Docket No. EP 677, Apr. 17, 2008, at 9; Association of American Railroads (AAR) Comments, Docket No. EP 677, Apr. 17, 2008, at 24-25; UP Written Testimony, Docket No. EP 677 (Sub-No. 1), July 10, 2008, at 4-5, 10-12; AAR Written Testimony, Docket No. EP 677 (Sub-No. 1), July 10, 2008, at 4-7, 14-15, 23-24, 31; UP V.S. of Warren Beach, Docket No. EP 677 (Sub-No. 1), Aug. 21, 2008, at 5-6.

⁸ See UP Reply, Reply V.S. of Warren Beach, at 2; Can. Pac. Ry. Opening, Attachment 2, at 3 & App. II (estimates in a report issued by the American Academy of Actuaries).

A. Insurance as a Solution for Smaller Liabilities

UP asserts that insurance is not an adequate solution to the problem of TIH-related liability, even for a “relatively small” TIH incident (i.e., an incident resulting in liabilities below the amount of insurance coverage UP can purchase, which UP asserts is currently \$1.2 billion). See UP Opening 9. With respect to smaller incidents, UP makes several arguments as to why it believes the indemnity in its tariff is a better solution than insurance, contending that: (a) UP self-insures up to \$25 million; (b) even relatively small TIH incidents are likely to lead to increased premiums (or even revocation of UP’s coverage, requiring UP to obtain a new, more expensive policy); (c) even relatively small incidents are likely to lead to a reduction in the amount of coverage available; and (d) each incident resulting in an insurance payment will reduce the amount of coverage available for the remainder of the year. See id; UP Reply 11-12 & Reply V.S. of Warren Beach 1-3.

That UP self-insures for incidents up to \$25 million, however, or that its premiums may increase following an incident, does not mean that UP is left unprotected from these smaller TIH incidents. To the extent appropriate, UP can recover these costs just as it would recover any other operating cost, such as labor, equipment, fuel cost, real estate, or advertising.

UP further contends that it cannot be assured of recovering TIH-related insurance costs through rates because the Board’s Uniform Railroad Costing System (URCS) spreads those costs across all traffic, without regard to whether certain costs are higher because of the hazardous nature of the commodity. See UP Reply 13-14. The Board’s rate processes, however, permit recovery of these costs just as a railroad would recover any other cost. UP does not assert that its TIH-related insurance costs are treated differently than other costs.

As for UP’s assertion that even a small TIH incident on UP (or another railroad) may lead insurers to reduce the amount of coverage available, this is an extension of UP’s argument that it needs the indemnity to protect itself from uninsurable risks. UP’s tariff provisions are overly broad in that they would require shippers to protect UP from risks against which UP can already protect itself through insurance, regardless of whether the threshold up to which this protection applies—i.e., the amount of insurance coverage available—changes or remains the same.

Moreover, UP’s insurance-related arguments, including its contention that smaller incidents could consume the coverage available in a given year, are not specific to TIH. For example, UP’s self-insured retention applies to UP’s entire commercial liability policy, rather than any particular commodity. See UP Reply 12; Beach Reply V.S. 3. Thus, if UP’s rationale based on these aspects of its insurance policy were sufficient to support its indemnity provisions, this rationale would extend to shipper indemnification of UP for all commodities, not only TIH. Such an approach would have broad ramifications, which we are not prepared to endorse.

B. Shipper Incentives

According to UP, relying on insurance for protection against smaller TIH incidents would not accomplish its goal of providing incentives for shippers to reduce risk in connection with TIH shipments by rail. See UP Opening 15. Specifically, UP asserts that the indemnity will give shippers an important incentive to consider what TIH materials to ship, how much of it to ship, when to ship it, and the origin and destination of TIH shipments (which affects the distance the TIH moves and what geographical area it is likely to move through). See id. at 17.

Railroads and TIH shippers disagree strongly as to whether it is appropriate for the railroads to dictate (in the shippers' view) or provide incentives that influence (in the railroads' view) the distances and destinations for TIH commodities. However, we need not reach that question here, because we do not agree that UP's tariff provisions would be the only option available to provide such incentives to its shippers. Because there are methods of creating these incentives that are significantly less onerous than requiring shippers to bear liabilities for which they are not directly responsible,⁹ we conclude that UP has not justified using its indemnity with respect to insurable risks.¹⁰

III. Conclusion

As the proponent of a declaratory order, UP has the burden of proof as to the reasonableness of its tariff provisions,¹¹ and it did not carry this burden. UP has not provided adequate support for requiring shippers to protect UP from smaller, non-catastrophic risks and from liabilities not due to the presence of TIH.¹² Therefore, we deny UP's petition for a declaratory order.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

⁹ See, e.g., N. Am. Freight Car Ass'n v. STB, 529 F.3d 1166, 1172 (D.C. Cir. 2008).

¹⁰ UP also argues that its tariff provisions are beneficial because they would provide uniformity in the treatment of TIH liabilities, as opposed to the laws of 23 states to which UP is currently subject. See UP Opening 14; UP Reply 22. While uniform treatment across multiple states or other jurisdictions can be an important interest, it is not enough, by itself, to support a requirement that all shippers receiving common carrier transportation of TIH indemnify UP against liabilities for which they are not directly responsible.

¹¹ See 5 U.S.C. § 556(d); City of Lincoln v. STB, 414 F.3d 858, 862 (8th Cir. 2005).

¹² Opponents of UP's indemnity tariff raised additional arguments to support their contention that the tariff is unreasonable. Given our determination regarding the overly broad effect of UP's tariff, we need not address these other arguments in order to determine that the declaratory order sought by UP should be denied.

It is ordered:

1. UP's petition for a declaratory order is denied.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.